No. 95-856

(3)

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. JANKLOW, GOVERNOR,
AND MARK W. BARNETT, ATTORNEY GENERAL,
IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PLANNED PARENTHOOD, SIOUX FALLS CLINIC,
BUCK J. WILLIAMS, M.D., AND
WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF A PETITION FOR CERTIORARI

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, *Amicus Curiae* National Right to Life Committee, Inc., respectfully moves the Court to allow it to file a brief in support of the Petition For Certiorari in the instant matter. In support of this motion, your *amicus* states as follows:

1. Your *amicus* has obtained the written consent of the Petitioner in this action to file the requested brief; said consent is submitted to the Clerk contemporaneously with this motion. The Respondent has refused to grant consent to this brief.

2. This brief will bring relevant matter to the attention of the Court which has not been submitted by the parties and will bear on the need for this Court to grant said Petition.

3. It will discuss the views of individual justices of this Court regarding the constitutionality of a one-parent notification statute without the presence of a judicial bypass for minors seeking abortions. It will also discuss in detail the efficacy of, as well as the concomitant need for, such a bypass.

4. Finally, it will analyze in detail the differing positions of the justices of this Court regarding the continuing viability of the facial challenge rule to abortion statutes, as well as the resultant confusion among the lower federal courts on this issue.

WHEREFORE, your *amicus* respectfully prays that the Court grant its motion to file a brief *amicus curiae* in support of the Petition for Certiorari in the case at bar.

Respectfully submitted,

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QUESTIONS DEALT WITH HEREIN

1. Whether this Court should grant the Petition For Certiorari in order to correct the error of the Court Of Appeals that the Constitution requires a one-parent notification abortion statute to contain a judicial bypass where this notice requirement is waived for a broadly defined class of abused and neglected minors?

2. Whether this Court should grant the Petition For Certiorari in order to clarify the standard for evaluating facial challenges to abortion statutes in light of *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), and to resolve the confusion among the circuits regarding the appropriate test to apply in this context.

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INTEREST OF AMICUS CURIAE

The National Right to Life Committee, Inc. (NRLC), is a nonprofit organization whose purpose is to promote respect for the worth and dignity of human life until the time of natural death, including the lives of unborn persons. It is a non-partisan, non-sectarian federation of fifty state right-to-life groups, made up of approximately 3,000 local chapters. NRLC is governed by a board of directors comprised of one representative from each of the fifty states and the District of Columbia, as well as three at-large directors. NRLC is made up of individuals from every race, creed, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to further its purpose.

The members of NRLC have been the primary supporters of laws protecting innocent human life from the time of conception until the time of natural death. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of NRLC have supported legislation to protect unborn human life within these guidelines, including the legislation at issue in the case at bar. By means of this brief, NRLC seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF ARGUMENT

This Court has recognized that protecting its minor citizens is a legitimate interest which the state may advance by requiring minors to notify their parents before they obtain an abortion. In this regard, a majority of this Court has indicated that requiring only one-parent notification advances this interest without interfering with a minor's constitutional rights; a judicial bypass is not needed as an additional safeguard. Moreover, the evidence shows that far from assisting a minor with this

difficult decision, such a bypass actually places additional, and unnecessary, stress upon her. Thus, because the lower court held that South Dakota's one-parent notification law was unconstitutional for lacking a bypass, it erred. This Court should grant the petition to correct this error and thereby allow South Dakota and her sister states to utilize an important tool in furthering the best interests of their youngest citizens.

In addition, the lower court rejected the standard for evaluating facial challenges outside the First Amendment context set forth in *United States v. Salerno*, 481 U.S. 739 (1987), and reaffirmed in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). This approach by the Eighth Circuit, though in harmony with that of the Third Circuit, is at odds with the approach taken by the Fifth Circuit, and stems from the conflicting views articulated by the justices of this Court in *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). Subsequent opinions have repeated these conflicting views, which has only heightened the confusion among the circuits regarding the appropriate standard to apply in evaluating facial challenges to abortion laws. This Court should grant the petition to clarify the law on this issue.

REASONS FOR GRANTING THE WRIT

I. WHETHER A JUDICIAL BYPASS PROVISION IS REQUIRED IN A SINGLE-PARENT NOTICE ABORTION STATUTE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT – PARTICULARLY BECAUSE THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS AT ODDS WITH THE VIEWS OF MEMBERS OF THIS COURT.

This Court has observed that "[t]he welfare of the child has always been the central concern of laws with

regard to minors," and that to satisfy this concern, the State may pass laws which "protec[t] . . . the right of each parent to participate in the upbringing of his or her own children." *Hodgson v. Minnesota*, 497 U.S. 417, 482-483 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part). In this regard,

> [t]here can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

Bellotti v. Baird, 443 U.S. 622, 640-641 (1979), (opinion of Powell, J.). The reason for involving parents in such a decision is that

> [t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

In the case at bar, South Dakota has attempted to advance these two interests, protecting the welfare of minors and safe-guarding the role of their parents, by providing that an unemancipated minor who seeks an abortion must first notify her parents of this contemplated decision, unless it would not be in her best interests to do so; this general caveat to the parental notice requirement is codified in the statute with a series of broad exceptions. *App.* at 84. As will be discussed, *infra*, in passing this provision, South Dakota has followed the pronouncements of this Court with regard to safeguarding minors' interests, while at the same time refusing to

abdicate its *responsibility* as an "ultimate guardia[n] of the liberties and **welfare** of the people in quite as great a degree as the courts." *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) (emphasis added).

Nevertheless, the court of appeals struck down the statute as unconstitutional. Because this decision disregards the views of members of this Court and deprives South Dakota and her sister states of an effective tool for furthering the welfare of its minor citizens, the Court should grant the petition for certiorari.

A. Prior Rulings Of This Court Do Not Mandate A Judicial Bypass For One-Parent Notification Statutes.

As intimated, *supra*, members of this Court have identified two state interests for requiring parental *notification* when minors seek abortions: "the State's interest in the welfare of pregnant minors" and "the State's interest in acknowledging and promoting the role of parents in the care and upbringing of their children." *Hodgson*, 497 U.S. at 482 (Kennedy, J., concurring in the judgment in part and dissenting in part). In the context of a *two*-parent notification requirement, this Court has noted that in certain cases, e.g., where the minor is a victim of physical or sexual abuse, either it may not be in the best interests of minors to notify their parents that they are seeking abortions or they may not in fact do so, *id.* at 438-440; as a result, it has required a mechanism whereby minors may bypass the parental notification requirement, e.g., a judicial bypass,[1] and thereby obtain abortions. *Id.*

[1] The judicial bypass requirement originated in the context of parental *consent* requirements for minors to obtain abortions. *Bellotti v. Baird*, 428 U.S. 132 (1976). The reason for the bypass was to remove the possibility that a third party, i.e., the minor's parent, would "veto" the minor's decision whether to terminate her pregnancy. *Planned Parenthood Of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("The State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."). In the case at bar, however, the provision at issue is **not** a parental consent requirement, but rather is a parental notification requirement; thus, the concern that a minor's parent may bar her ability to obtain an abortion is, by definition, not implicated.

at 461 (O'Connor, J., concurring in part and concurring in the judgment in part); *id.* at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part).

However, this Court has never held that a judicial bypass is required for a one-parent **notification** statute. Thus, by holding that a bypass *is* required in such cases, the court of appeals creates new law. In light of the views articulated by members of this Court, this creation is ill-founded.

Based upon prior opinions, at least five, and possibly six (discussed in Part I.B., *infra*), members of this Court would hold that a judicial bypass is **not** required in one-parent notification statutes, particularly if there are broad statutory exemptions from such a requirement. In sum, Justices Kennedy and Scalia, along with the Chief Justice, have emphasized that a judicial bypass is not needed in either a one or two-parent notification statute. *Id.* at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part).[2] Based upon prior opinions, it is

[2] Specifically, Justice Kennedy, writing the dissent in *Hodgson* which was joined by Chief Justice Rehnquist and Justices White and Scalia, said of Minnesota's parental notice law, "Given the substantial protection that minors have under

likely that Justice Thomas would concur in these views. Furthermore, Justice O'Connor has stated that if a statute requires notifying only one parent, it is not necessary that a judicial bypass exist. *Id.* at 458-461 (O'Connor, J., concurring in part and concurring in the judgment in part).

Thus, because the decision of the court of appeals is contrary to the views of at least five members of this Court, the Petition For Certiorari should be granted to remedy this error.

B. A Judicial Bypass Is Nothing More Than A "Rubber Stamp" Which Is Not Needed In This Case Because Parental Abuse Is More Than Adequately Addressed In The South Dakota Parental Notice Law.

Justice Stevens has stated that if a judicial bypass exists in a *one*-parent notification statute, the statute is constitutional. *Id.* at 455-458 (Stevens, J., dissenting). As will be shown, the concerns which underlie this view are *better* allayed by the statutory scheme in the instant case than by a judicial bypass. Thus, Justice Stevens may also uphold the South Dakota law.

The purpose of a judicial bypass is not only to ensure the ability of a minor to obtain an abortion, *Bellotti*, 443 U.S. at 643, but also to protect her welfare in this regard, i.e., to determine that an abortion is indeed "in her best interests." *Id.* at 644. In terms of the latter, the Court is supposed to replace the role of the parent; it is supposed to function as "a **consent substitute** in the form of an

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Minnesota law generally, and under the statute in question, the judicial bypass provisions of the law are not necessary to its validity. The two-parent notification law enacted by Minnesota is, in my view, valid without the judicial bypass provision. . . ." *Id.* at 489.

adequate judicial bypass procedure." *Hodgson*, 497 U.S. at 499 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added). In short, the court is supposed to *assist* the minor in this important decision-making process.

However, far from assisting the minor child to any degree in this decision, both abortion opponents and proponents alike agree that the judicial bypass procedure is almost always a "rubber stamp," a routine judicial authorization for a minor to have an abortion without notifying her parents. For example, in Minnesota, interviews with minors at four abortion clinics revealed that 43% of the girls used the court bypass option that is part of that state's parental notification statute.[3] Of the 3,573 bypass petitions filed in the Minnesota courts when the parental notice law was in effect from August 1, 1981 to March 1, 1986, 3,558 were granted. Six of those petitions were withdrawn before decision; only nine were denied. *Hodgson v. Minnesota*, 648 F.Supp. 756, 765 (D. Minn. 1986). Judge Allen Oleisky has heard over 1,000 of these petitions and describes his role at a bypass hearing as "a routine clerical function on my part, just like putting my seal and stamp on it." *Id.* at 766.

Similarly, in Massachusetts, more than 90 percent of the bypass petitions are granted on the ground that the minor is "mature," and "almost all of the remaining minors' requests for abortion are approved as being in

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[3] Blum, Resnick & Stark, *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortions*, FAMILY PLANNING PERSPECTIVES, July-Aug. 1990, vol. 22, no. 4, p. 158. The four clinics that participated in the study account for more than 75 percent of the abortions in Minnesota.

their best interest."[4] Jamie Sabino, an attorney who coaches teenagers and walks them through the bypass process observes that "[o]f the minors that go to court, 98% of them are found to be mature – the judges don't even have to go on to the second tier hearing to determine if the abortion is in their best interest."[5] The hearings typically last 12 minutes;[6] the decision-making is perfunctory.[7]

The bypass procedure is not a reliable system of adjudging a minor's ability to make a mature decision. An analysis of cases in Massachusetts where minors were judged to be immature, but then had their abortions approved as being in their best interests, failed to reveal a single factor that could differentiate between maturity and immaturity.[8] Moreover, when lawyers and judges who handled the petitions would consider certain minors to be immature, they rarely could identify the same teenager.[9]

Thus, the judicial bypass procedure does not contain the element of mature, decision-making assistance which is supposed to exist as a substitute for that which the

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[4] Melton, *Legal Regulation of Adolescent Abortion*, American Psychologist, January 1987, p. 80.

[5] Jamie Sabino, Esq. speaking at a meeting of "The Family Planning Advocates," Albany, New York (January 23-24, 1989).

[6] *Study Shows Teen Abortion Often Delayed 4-5 Days by State Laws*, Pediatric News, February 1989.

[7] Melton, *Legal Regulation of Adolescent Abortion*, p. 80.

[8] *Study Shows Teen Abortion Often Delayed 4-5 Days by State Laws*, Pediatric News, February 1989. Further, "the lack of variance in these rulings makes it impossible to compare statistically judgments of maturity."

[9] *Study Shows Teen Abortion Often Delayed 4-5 Days by State Laws*, Pediatric News, February 1989.

minor's parent would provide. Moreover, not only does this procedure not assist the minor in making this difficult decision, it actually puts *additional* stress on her. As this Court noted in *Hodgson*,

> [t]he judges who adjudicated over 90% of the bypass petitions [in Minnesota courts] testified; none of them identified any positive effects of the law. The court experience produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to forego the bypass option and either notify their parents or carry to term.

497 U.S. at 441-442 (internal quotation marks omitted).[10] In light of its net harmful effect on minors, the question arises: why require a judicial bypass?

The one aspect for which a judicial bypass *might* be necessary is to ensure that a minor who is subject to physical or sexual abuse by her parents is not deprived of her ability to obtain an abortion solely for fear of notifying them of such a decision. The statute in this case,

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[10] This Court also noted in *Hodgson* that,

> [o]ne [judge] testified that minors found the bypass procedure "a very nerve-racking experience"; . . . another testified that the minor's "level of apprehension is twice what I normally see in court." . . . A Massachusetts judge who heard similar petitions in that State expressed the opinion that "going to court was 'absolutely' traumatic for minors . . . 'at a very, very difficult time in their lives.' " . . . One judge stated that he did not "perceive any useful public purpose to what I am doing in these cases" and that he did not "see anything that is being accomplished that is useful to anybody."

Id. at 441, n.29 (internal citations omitted).

however, addresses this problem better than would a stressful judicial bypass procedure.

A judicial bypass may actually deter minors from reporting such abuse, for a minor would rather tell her physician, in confidence, of such abuse, than a judge in court. Such a deterrent would not only prevent a minor from obtaining an abortion, if that were in fact in her best interests, but it would also deprive her of the counseling and assistance she may need to deal with an abusive relationship. Those few cases in which parents may be abusive are best handled by ensuring that the child abuse and neglect authorities are informed, not by giving the child a secret abortion and sending her back into the abusive situation. The statute in question provides such assistance to the minor without depriving her of her constitutional rights.

If a minor is subject to abuse or neglect, the South Dakota parental notice law does not require that a parent be told the minor is considering an abortion. Instead, it provides that before performing an abortion, the physician report the abusive situation to the proper authorities, enabling them to intervene with counseling and support. If warranted, child abuse and neglect authorities can take steps to assure her protection, including removing her from the abusive home. Furthermore, in such cases, the statute allows the minor to obtain an abortion without having to notify either parent. *App.* at 84. In this regard, it is more effective than a judicial bypass.

Nevertheless, the court of appeals invalidated the statute because it did not provide for a judicial bypass. *App.* at 2. This erroneous decision (*see* Part I.A., *supra*) deprives South Dakota and her sister states of an effective, yet unintrusive, means of protecting the welfare of its minor citizens. This Court should grant the Petition

For Certiorari in order to correct this far-reaching, erroneous precedent and remedy the constitutional injustice to South Dakota.

II. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI IN ORDER TO ELIMINATE THE CONFUSION AMONG THE CIRCUITS CONCERNING THE VIABILITY OF *UNITED STATES V. SALERNO* IN FACIAL CHALLENGES TO ABORTION STATUTES, WHICH IS MANIFEST IN THIS CASE AND IS ENGENDERED BY THIS COURT'S RECENT, INCONSISTENT PRONOUNCEMENTS ON THIS ISSUE.

This Court had traditionally employed clear standards in evaluating facial challenges to statutes. Outside of the First Amendment context, this standard required courts to give special consideration to the statutes so challenged. Specifically, it required that plaintiffs show the statute in question could never be applied constitutionally. This rule for evaluating facial challenges was established by this Court in *United States v. Salerno*, 481 U.S. 739 (1987), where it declared:

> [a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id. at 745.

This Court had employed this facial challenge rule in well-known abortion cases as recently as 1991, in the case of *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), and 1992, in

Planned Parenthood of S.E. Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). In *Rust*, this Court quoted and employed the *Salerno* analysis in rejecting a facial challenge to regulations prohibiting the use of public funds (in the Title X family planning program) for abortion counseling and referral, as well as activities advocating abortion as a method of birth control. *Id.* at 1767.

In other abortion cases, this Court has also expressly eschewed any (First-Amendment like) overbreadth doctrine. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment)). For example, in *Webster*, Justice O'Connor, co-author of the controlling joint opinion in *Casey*, explained that "some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially constitutional." *Id.* at 524.

Unfortunately, *Casey* has confused facial challenge jurisprudence outside of the First Amendment context by raising questions about the *Salerno* test in terms of its applicability to abortion cases. The question among members of both the bench and bar is whether the joint opinion by Justices O'Connor, Kennedy, and Souter replaced the normal facial challenge test with a new formula: whether for a "large fraction" of women affected by the statute the state regulation imposes an undue burden on women's ability to make decisions concerning whether or not to procure an abortion. *Casey*, 112 S.Ct. at 2830. It is the "large fraction" component of this (new?) standard which has left many puzzled.

Casey involved a challenge to the federal constitutionality of a Pennsylvania statute which required that

certain information be communicated to a woman seeking an abortion at least 24 hours before the procedure in order for her to consent to it. *Id.* at 2803. It also required that a married woman seeking an abortion notify her spouse (with certain exceptions designed to avoid abusive situations) before obtaining an abortion. *Id. Casey* was a facial challenge; the complaint was initiated before the law's provisions had taken effect. *Id.*

Because *Casey* concerned facial challenges, it would be expected that this Court would apply the *Salerno* test in evaluating its constitutionality. The *Casey* Court *did* apply this test when considering the 24-hour waiting period. The majority which upheld this provision consisted of Justices O'Connor, Kennedy, and Souter, *id.* at 2826 (joint opinion), as well as Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas. *Id.* at 2868 (Rehnquist, J., concurring in the judgment in part and dissenting in part). In so doing, the joint opinion *expressly* noticed that this *was* a **facial challenge**: "on the record before us, and in the context of this *facial challenge*, we are not convinced that the 24-hour waiting period constitutes an undue burden." *Id.* at 2826 (emphasis added).

Thus, any notion that this Court was abandoning the facial challenge rule for abortion statutes *might* have been laid to rest by this passage; it clearly takes note of the facial challenge posture of the case in deciding whether there is an undue burden and applies the undue burden test in this context.

However, while *Casey* applied the facial challenge test in considering the 24-hour waiting period, a different majority regrettably confused matters by its treatment of the spousal notice provision. This time, the joint opinion, speaking also for Justices Blackmun and Stevens, took note of Pennsylvania's assertion that the spousal notice

provision must be upheld because this was a facial challenge, and less than one percent of women seeking abortions would even be affected by this provision. *Id.* at 2892. The Court did not say that the facial challenge rule was inapplicable or even altered; rather, it "disagree[d] with [Pennsylvania's] basic method of analysis." *Id.*

Specifically, this Court held that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Id.* It then declared that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2829. This Court insisted that, in such a situation, the "controlling class" was not all women who wish to obtain abortions, but rather "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions in the notice requirement." *Id.* at 2829-30. Because it opined that the spousal notice provision would be an "undue burden" on a "large fraction" of these women, the Court held it was invalid.

As noted, this language has caused confusion regarding the continuing viability of the *Salerno* rule for facial challenges to abortion statutes. Under the *Salerno/Rust* formulation, if only a "large fraction" of this one percent of women would experience an undue burden, then the statute should survive a facial challenge because *Salerno* requires that the statute have no constitutional applications in order for it to succumb to such a challenge. As a result, Chief Justice Rehnquist noted in his dissent in *Casey* that the joint opinion "appears to ignore" the traditional facial challenge standard of review. *Id.* at 2870 & n.2.

For at least two reasons, some commentators believe it is unlikely that this Court intended to overrule the

general applicability of the facial challenge rule via the analysis it employed in *Casey*. First, they note that this analysis seems to be an anomaly of the sort common to abortion jurisprudence, to wit, the "abortion distortion" effect, whereby the law is lamentably distorted wherever it is touched by abortion. *See, e.g.*, Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181 (1989) (cataloging at length the abortion-distortion effect).[11]

Second, they point out it is unlikely that the Court intended to overrule *sub silentio* the facial challenge doctrine with regard to abortion cases, or cases in general, by its analysis in one part of *Casey*. As noted, only four years ago in *Rust*, when faced squarely with the issue, this Court employed the *Salerno* facial challenge principle in a major abortion case. Given this Court's recent, express

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[11] Numerous normal rules of law have been ignored in abortion decisions, including, but not limited to, rules involving: (1) standing, *see* Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 160-67 (criticizing the misuse of the standing rules in *Roe v. Wade*); (2) mootness, *see id.* (pointing out *Roe*'s distortion of the mootness standards); (3) not going to the merits of a case before a trial is held or facts developed, *see Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814-15 (1986) (O'Connor, J., dissenting) ("If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents."); (4) construing statutes where fairly possible in a constitutional manner, *see Thornburgh*, 476 U.S. at 812 (White, J., dissenting) ("The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs."); and (5) vagueness, *see Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 475 (1983) (O'Connor, J., dissenting) (asserting that the Court was distorting the void for vagueness rule).

adherence to the *Salerno* rule in *Rust*, it is doubtful, they believe, that it would silently overrule such an important principle only one year later in *Casey*. *Id.*

In light of these two factors, some cases have assumed no *sub silentio* overruling of the *Salerno/Rust* facial challenge rule with regard to abortion cases, let alone other cases.[12] For example, in *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 656 (1992),[13] the Fifth Circuit cited *Salerno* and Chief Justice Rehnquist's dissent (in part) in *Casey* as authority for using the traditional facial challenge standard. *Id.* at 14. In footnote two, the *Barnes* court observed that:

> The *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here. Nevertheless, we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.

Id. at 14 n.2.

The Fifth Circuit's view has been validated by recent pronouncements by justices of this Court. For example, in his dissent to the Court's refusal to grant certiorari in the Guam abortion case of *Ada v. Guam Society of Obstetricians*

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[12] In addition, outside the abortion area, the debate over *Casey* goes unnoticed, as in the case of *Action for Children's Television v. FCC*, 827 F.Supp. 4 (D.D.C. 1993). In this post-*Casey* case, the district court quoted *Rust* and *Salerno* for the facial challenge rule and proceeded to apply it to uphold the statute being challenged. *Id.* at 16.

[13] *Barnes* involved a facial challenge to the Mississippi Informed Consent to Abortion Act, which required physician disclosure of certain information to women seeking an abortion and a 24-hour wait before the procedure could be performed.

& Gynecologists, 113 S. Ct. 633 (1992), Justice Scalia, joined by Chief Justice Rehnquist and Justice White, pointed out that *Casey* did not alter the facial challenge analysis. In so doing, he initially noted the problems with such a change in the law:

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting – through judicial decision or enforcement discretion – statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.

Id. at 634. With these problems in mind, Justice Scalia concluded that "[t]he Court did not purport to change this well-established rule last Term, in [*Casey*]." *Id.*

However, other courts have taken a different approach. They note that the facial challenge rule was ignored by the *Casey* majority in considering the spousal notice provision, but limit the holding of the Court on this issue to the narrow facts on which it was decided and ignore it in other cases. This may be due to their appreciation of the abortion-distortion effect.

For example, in *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992), a federal district court considered a facial challenge to Utah's abortion law which, *inter alia*, required spousal notification. In its decision, the court relied, in part, *id.* at 872, on Justice Scalia's dissent in *Ada v. Guam Society of Obstetricians & Gynecologists*. While it noted that his comments were made in dissent, it also observed that they were made by three justices and "reiterates the familiar rule of law which continues to be binding upon lower courts." *Jane L.*, 809 F. Supp. at 872. It added that, "[t]he Supreme Court has consistently

refused to apply the doctrine of overbreadth beyond the First Amendment context." *Id.* (citing *Salerno* and *Rust*).

In this regard, the court noted that the case involved a facial challenge, quoting *Salerno* and *Rust*, *id.* at 871 & n.10, 878 & n.33, but also noted that "it seems that in some contexts [this Court has], *sub silentio*, abandoned the traditional facial challenge approach in favor of an undue burden approach." *Id.* at 871 & n.10. As a result, it struck down the spousal notice statute, following *Casey's* altered facial challenge analysis. *Id.* at 876 & n.27. However, with regard to the rest of the provisions at issue, it followed the standard facial challenge rule and upheld them. *Id.* at 871 & n.10; 878 & n.33.

At the other end of the spectrum, some courts have concluded that in *Casey*, this Court completely overruled the *Salerno/Rust* analysis in all abortion jurisprudence, not merely with regard to spousal notice provisions. For example, after this Court's *Casey* decision, the Third Circuit, in *Casey v. Planned Parenthood*, 14 F.3d 848 (3rd Cir. 1994), opined that in *Casey*, this Court had "set a new standard for facial challenges to pre-viability abortion laws." *Id.* at 863 n.21. The new standard, according to the Third Circuit, "requires only that a plaintiff show an abortion regulation would be an undue burden 'in a large fraction of the cases.' " *Id.* While this comment was *dictum*, it reflects the views of the Third Circuit, which are at odds with those of the Fifth Circuit (*see* discussion, *supra*).

Other justices of this Court seem to validate this view of *Casey*. For example, in *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668 (1993), Justice O'Connor, joined by Justice Souter, expressed her opinion on the facial challenge issue, though it, too has no precedential

value.[14] She stated that *Casey* had eliminated the usual facial challenge test for "a law restricting abortions" in favor of a test striking down abortion restrictions as undue if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 1669 (internal quotes and citation omitted). Significantly, Justice Kennedy, who co-authored the *Casey* joint opinion, did not join in this opinion, nor did Justices Blackmun and Stevens, whose partial concurrences made possible the striking down of the Pennsylvania spousal notice statute, thus implying that these justices may no longer share their colleagues' views.

In sum, given that the Chief Justice and Justices White and Scalia agree that the facial challenge rule was not overturned in *Casey;* Justices O'Conner and Souter have expressed contrary views; Justices Kennedy and Stevens may have shied away from their prior views; and the other justices have not weighed in on the controversy, only one thing is clear regarding the continuing viability of the *Salerno/Rust* rule in the aftermath of *Casey:* there is no clear pronouncement of this Court concerning its applicability in abortion jurisprudence.

This confusion is evidenced by the views of lower federal courts, e.g., *Barnes, Jane L.*, and *Casey* (Third Circuit opinion), including the view of the Eighth Circuit in this case, which, like that of the Third Circuit, conflicts with the holding of the Fifth Circuit on this issue. The

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[14] *Schafer* involved a facial challenge to North Dakota's abortion statute. The district court applied the *Salerno/Rust* facial challenge test and dismissed the complaint; the Eighth Circuit affirmed. *Id.* This Court denied a stay and injunction pending appeal. *Id.*

Court should grant the petition in order to provide guidance in this murky area of the law.

CONCLUSION

Wherefore, your *amici* respectfully request that the Court grant the Petition for Writ of Certiorari in this case.

Dated: January 2, 1996

Respectfully submitted,

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